IN THE

Supreme Court of the United States

OCTOBER TERM, 1924 1925

No. 381 58

JOHN W. STEPHENSON, EMMA THOMSON, JENNIE STEPHENSON, MARY S. WEIMER, and W. B. STEPHENSON, *Appellants,*

vs.

H. L. KIRTLEY, H. W. HEROLD and F. E. CAWLEY, *Appellees.*

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

REPLY BRIEF ON BEHALF OF APPELLANTS.

A. J. HORAN,
BROWN, JACKSON & KNIGHT,
Attorneys for Appellants,
LON H. KELLY,
HERMAN L. BENNETT,
Of Counsel.

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Reply Brief on Behalf of Appellants.

Replying as briefly as may be to the brief filed on behalf of H. L. Kirtley and H. W. Herold, two of the ap-

pellees, counsel for appellants beg leave to submit the following.

We cannot agree with the statement of opposing counsel that there are any errors of commission in the statement of facts as they appear in our original brief, although it may be that there are some errors of omission; but as the facts alleged in Appellants' bill filed in the United States District Court are taken as true upon the motion to dismiss, reference to that bill is here made for a full statement of the facts in so far as they are pertinent to the issues here raised.

It is respectfully submitted that opposing counsel seek to attach undue weight to the recitals contained in the decree of the Circuit Court of Nicholas County. In this particular case and in any case where defendants are proceeded against as non-residents, by substituted service, the recitals in the decree entered are not conclusive; and in support of this proposition the following authorities are cited.

The case of Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959, is a leading and well considered case upon this particular subject and other kindred questions involved in this cause, and from it we cite the following:

> "In a court of general jurisdiction, acting within the scope of its general powers, when jurisdiction of the subject-matter exists and appears, jurisdiction of the person will be presumed when the record is silent as to the latter, but such presumption will be limited to persons within its territorial limits."
>
> "Where the record states facts showing that a defendant is without the territorial limits of the

court, and that he never appeared in the action, presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

"When, by law of a State, constructive service of process by publication is substituted in place of personal citation against the person of an absent party, not a citizen of the State nor found within it, a strict and literal compliance with the statutory provisions is necessary.

"In proceedings had under special statutory authority, where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

This was a case in which the Circuit Court of the United States for the District of California was reversed and wherein the Circuit Court stated the rule of collateral attack upon the decree of the State court in the following language:

"When attacked collaterally it is not enough that the record does not affirmatively show jurisdiction, but, on the contrary, it must affirmatively show that the court did not have jurisdiction, or

the decree will be valid until reversed on appeal, or vacated on some direct proceeding taken for that purpose."

Mr. Justice Field, speaking for the Supreme Court of the United States, says, as to this pronouncement by the Circuit Court:

"But the rule of law as stated by the circuit court is not universally true. It is subject to many exceptions and qualifications, and has no application to the case at bar. * * *

"The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law."

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length, had it not been

impugned and denied by the circuit court. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.

When, therefore, by legislation of a State, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union. It has been so held by the Supreme Court of California in repeated instances. In Jordan v. Giblin, 12 Cal., 100, decided in 1859, service of publication was attempted, and the court said that it had already held, 'in proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.' In Ricketson v. Richardson, 26 Cal., 149, decided in 1864, the court, referring to the sections of the statute authorizing service by publication, said: 'These sections are in derogation of

the common law, and must be strictly pursued in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule there prescribed in any particular is fatal where it is not cured by an appearance." * * *

"If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued." * * *

" 'However high the authority to whom a special statutory power is delegated,' says Mr. Justice Coleridge, of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with.' "

" 'A court of general jurisdiction,' says the Supreme Court of New Hampshire, 'may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. Morse v. Presby, 5 Fost. 302.

"The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When

the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. Such is the purport of the language and decision of this court in Harvey v. Tyler, 2 Wall. 332 (69 U. S. XVII., 871). But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." * * *

"In the supplemental complaint filed in the action of Gray v. Eaton and others, and in the original complaint of Eaton v. Palmer, the absence of Franklina from the State and her residence in another State are alleged. The record in the two actions, and of course in the consolidated action, shows that she was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the district court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction

was obtained. The statute provides, in case of absent and non-resident defendants, for constructive service of process by publication. It requires an order of the court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must prescribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State it could hardly be expected that it would be followed by a Federal Court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, have never been pursued."

We cite also the case of Cooper v. Newell, 173 U. S. p. 555, 43 L. Ed. 808, 812, 813. The question involved in this case is whether the judgment entered by a court of Brazoria County, Texas, in favor of one McGrael against Newell was open to attack in the Circuit Court of the United States for the Eastern District of Texas.

"When a judgment of a state court comes under consideration in a court of the United States sit-

ting in the same state, the question of jurisdiction of the state court to render the judgment is open to inquiry in the United States court."

"In such case, evidence is admissible to contradict the recital in the judgment that defendant was a citizen and resident of the state, and to show that he was not served with process and that the attorney who appeared for him had no authority to represent him."

"In Thompson v. Whitman, 18 Wall. 457, a leading case in this court, it was ruled that 'neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered;' that 'the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, *notwithstanding it may recite that they did exist*;' and that 'want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem,* as to the thing.'" * * *

"And so in New York, when a judgment of a court of that state was drawn in question, which had been entered against a non-resident, who was not, during the pendency of the proceedings, within the jurisdiction of the state. Vilas v. Plattsburgh & Montreal Railroad Company, 123 N. Y.

440. There the rule that domestic judgments against a party not served, but for whom an attorney appeared without authority, cannot be attacked collaterally, was adhered to; yet the court of appeals declined to apply it to a case where the defendant was a non-resident and not within the jurisdiction during the pendency of the proceedings, such judgments being held to be not strictly domestic but to fall within the principle applicable to judgments of the courts of other states, in respect of which Andrews, J., delivering the opinion of the court said: 'It is well settled that in an action brought in our courts on a judgment of a court of a sister state the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney, that the appearance was unauthorized, and this even where the proof directly contradicts the record.' "

"We think the circuit court was clearly right in admitting evidence to contradict the recital that Newell was a citizen and resident of Texas, and to show that the attorney had no authority to represent him."

In the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, the question of recitals in a judgment or decree was fully examined in the light of the authorities. Mr. Justice Bradley, speaking for the court and delivering its unanimous judgment, stated the conclusion to be clear that the jurisdiction of a court rendering judgment in one State may be questioned in a collateral proceeding

in another State or in a proper court of the United States, notwithstanding the averment in the record of the judgment itself. From that opinion we quote the following:

> "But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.
>
> But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extraterritorial force."

The case of Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 124, 117 Pac. 1008, holds void on collateral attack a judgment against a non-resident where the record showed defective affidavit for publication.

The case of Duval v. Johnson, 90 Neb. 505, 133 N. W. 1126, holds that a recital in the judgment foreclosing a tax lien, that due and regular notice of the pendency of the action had been given the defendants, did not supply jurisdictional facts.

Gould v. Jacobson, 58 Mich. 293, 25 N. W. 197, holds that mere recital of due publication and return cannot cure want of it.

IN CONCLUSION we respectfully insist that the recitals in the decree in the instant case, which purport to confer jurisdiction or justify the exercise of jurisdiction, when such recitals are attacked in a proper United States Court, are without force or effect.

Respectfully submitted,

A. J. HORAN,
BROWN, JACKSON & KNIGHT,
Attorneys for Appellants,

LON H. KELLY,
HERMAN L. BENNETT,
Of Counsel.